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No. 87-1397

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

PYRO MINING COMPANY, - - - Petitioner,

versus

DANNY R. SMITH, - - - - - Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE H. AMSHOFF, JR.
RICHARD L. MASTERS
AMSHOFF, AMSHOFF, & SEARCY
1012 S. Fourth Street
P. O. Drawer 2848
Louisville, Kentucky 40201
(502) 582-3500
Attorneys for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals correctly applied precedent of this court fully consistent with the religious accommodation provisions of Title VII of the Civil Rights Act which attempt to lift a burden on religious practice that is imposed by private employers to insure that an employee such as Danny Smith is not discriminated against because of his exercise of his sincerely held religious beliefs where the employer refuses to acknowledge any meaningful, affirmative, responsibility to provide a reasonable accommodation.

2. Whether the decision below which explicitly recognized the congressional amendment to Title VII necessitating a re-evaluation of an issue decided prior to such congressional intervention is consistent with the doctrine of *stare decisis*.

3. Whether the decision below correctly gives effect to Title VII's valid secular purpose of assuring employment opportunity to all groups in our pluralistic society by outlawing employment discrimination based on race, color, religion, sex or national origin by imposing an affirmative duty on an employer to reasonably accommodate the religious needs of an employee who is at all times ready to cooperate with a meaningful accommodation but who never was given the opportunity to do so because such meaningful accommodation was never made.

INDEX

PAGE

Questions Presented i

Index ii

Citations iii

Opinions Below 1

Jurisdiction 1– 2

Counterstatement of the Case 2– 7

Argument 7–24

A. The Question of Whether the Application of Title VII Violates the Establishment Clause of the First Amendment Was Not Properly Raised or Preserved in the Courts Below 7– 9

B. The Decision Below Does Not Conflict With Any Analogous Decisions From Other Circuits, and Is Consistent With Both Title VII and the Decision of This Court in *TWA* v. *Hardison* 9–14

C. The Panel's Decision Does Not Conflict With the Doctrine of *Stare Decisis* 14–16

D. The Majority Panel Decision Correctly Affirmed the District Court's Findings as to the Sincerity of Smith's Religious Beliefs 16–19

E. The Majority Panel Decision Is Consistent With the Establishment Clause 19–24

Conclusion 25

Appendix A—Petitioner's Answer filed in U.S. District Court for the Western District of Kentucky..1a–5a

Appendix B—Tables of Contents from Petitioner's Brief and Reply Brief filed in the United States Court of Appeals for the Sixth Circuit 6a

Appendix C—Table of Contents of Petitioner's Motion for Rehearing *En Banc* 7a–8a

CITATIONS

Cases: PAGE

Anderson v. *General Dynamics Convair Aero Space Division,* 589 F. 2d 397 (9th Cir. 1978) 12
Ansonia Board of Education v. *Philbrook,* 479 U.S. ____, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986) 10
Brener v. *Diagnostic Center Hospital,* 671 F. 2d 141 (5th Cir. 1982) 11
Brown v. *General Motors Corporation,* 601 F. 2d 956 (8th Cir. 1979) 12
Burns v. *Southern Pacific Transportation Company,* 589 F. 2d 403 (9th Cir. 1978), *cert denied,* 439 U.S. 1072 (1979) 12
Chrysler Corporation v. *Mann,* 561 F. 2d 1281 (8th Cir. 1977) 11
Committee for Public Education v. *Nyquist,* 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973) 20
Cooper v. *General Dynamics,* 533 F. 2d 163 (5th Cir. 1976) 15–16
Corporation of Presiding Bishop, et al. v. *Amos,* 483 U.S. ____, 97 L. Ed. 2d 273, 107 S. Ct. ____ (1987) 22
Cummins v. *Parker Seal Co.,* 516 F. 2d 544 (6th Cir. 1975), rev'd on other grounds, 433 U.S. 2965 (1977) 19
Dewey v. *Reynolds Metals Co.,* 429 F. 2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U.S. 689, 91 S. Ct. 2186, 29 L. Ed. 2d 267 (1971) .14, 15
Draper v. *U.S. Pipe & Foundry Company,* 527 F. 2d 515 (6th Cir. 1976) 24
EEOC v. *Ithaca Industries,* 44 F.E.P. Cases 1572 (W.D.N.C. 1986), aff'd 126 L.R.R. 21 (4th Cir. October 12, 1987) 9
Estate of Thorton, et al. v. *Caldor, Inc.,* 472 U.S. ____, 86 L. Ed. 2d 557, 105 S. Ct. ____ (1985) .. 21
Hoover v. *Ronwin,* 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984) 9

PAGE

Lemon v. *Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) 19, 21, 22, 23

McDaniel v. *Essex International, Inc.*, 509 F. Supp. 1055 (W.D. Mich. 1981, on remand from 571 F. 2d 338 (6th Cir. 1978), aff'd. 696 F. 2d 34 (6th Cir. 1982) 12

Redmon v. *G.A.F. Corporation*, 574 F. 3d 897 (7th Cir. 1978) 12

Riley v. *Bendix Corporation*, 464 F. 2d 1113 (5th Cir. 1972) 16

Sherbert v. *Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) 20

Smith v. *U.S. Postal Service*, 766 F. 2d 205 (6th Cir. 1985) 16

Trans World Airlines v. *Hardison*, 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977) ..6, 9, 13, 14, 22, 25

U.S. v. *Seeger*, 380 U.S. 163, 13 L. Ed. 2d 733, 85 S. Ct. 850 (1965) 18

Wisconsin v. *Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) 18

Statutes:

28 U.S.C. §1343(4) 6

28 U.S.C. §2101 1

28 U.S.C. §2403(a) 1

42 U.S.C. §2000e 21

42 U.S.C. §2000e-5(f) 6

42 U.S.C. §2000e(j) 7, 21

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.' App. 18-57) is reported at 827 F. 2d 1081 (6th Cir. 1987). The decision of the U.S. District Court for the Western District of Kentucky, Case No. C-83-0126-0(M) was decided on October 22, 1985. (Pet. App. 1-17).

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1987. The Petitioner unsuccessfully sought rehearing *en banc* which motion was denied on November 18, 1987. The Petition for Writ of Certiorari was filed on February 15, 1988. The jurisdiction of this court is invoked under 28 U.S.C. 2101. Petitioner also alleges that 28 U.S.C. §2403(a) may be

applicable although Petitioner concedes that neither the trial court nor the Sixth Circuit Court of Appeals have certified to the Attorney General that the constitutionality of Title VII was drawn into question and as demonstrated herein this question was not properly preserved below.

COUNTER-STATEMENT OF THE CASE

The Plaintiff/Respondent Danny R. Smith (hereinafter "Smith"), was hired by Pyro Mining Company (hereinafter "Pyro") on June 19, 1981 as a mechanic in an underground coal mine. Pyro employs over one thousand persons who work underground and another one hundred and fifty surface employees. During the time of his employment at Pyro, Smith was a member of the Independent General Baptist Church located in Cedar Hill, Kentucky. Smith also held the church offices of treasurer and trustee at the time. He subsequently became a Sunday school teacher. The official doctrine of the church precluded all officers and teachers in the church from working on Sundays, although individuals could work on Sunday and remain church members. Based on the teachings of his church, Smith believes that it is morally wrong to work on Sundays in the absence of a life threatening situation. (Pet. App. at 19).

Prior to his acceptance of Pyro Mining Company's job offer of a position as a mine mechanic, Smith candidly informed Varney Coleman, Mine Superintendent of Pyro, that he had a religious conviction against working on Sundays. (Pet. App. at 3 and 19).

Although Smith believes the Sabbath to comprise the entire twenty-four (24) hour period between 12 midnight Saturday, and 12 midnight Sunday he did work for a period of time on the third shift which required him to report for work at 11:00 p.m. on Sundays because Smith felt, since Sunday church services at his place of worship and related religious observances and practices were long over, that reporting to work at 11:00 p.m. was a reasonable means of cooperation with Pyro in accommodating his religious beliefs and practices. (Pet. App. at 2 and 19).

Prior to July, 1982, Smith was not required to work on Sundays with the exception noted in the above paragraph. (See Pet. App. at 2 and 19).

Pyro instituted its so called "eight day work week" at the mine where Smith worked on July 11, 1982. Under this system employees were scheduled to work four consecutive ten hour days out of eight, meaning they had four days on and four days off. Under the eight day work week employees were scheduled to work approximately twenty-six Sundays during the year (Pet. App. at 2-3, 19). Prior to the implementation of the eight day work week, Pyro had a policy of communicating or advertising the fact that an employee needed to trade shifts and the company took an active role in contacting employees to participate in shift trades. Pyro had mechanisms in place for soliciting replacements through its monthly newspapers and bulletin boards and could have reasonably accommodated Smith by simply placing a notice in the news-

paper or on a bulletin board that a replacement was needed for him. (Pet. App. at 15-16 and 34-35).

Smith and all other employees of Pyro were scheduled to work on the first Sunday that the new work schedule went into effect regardless of any absences for religious reasons or any other reasons. The entire company had been on a two week vacation and prior to the vacation Smith had informed his immediate supervisor that he would not be reporting for work on Sunday, July 11, 1982, due to his religious convictions. Smith called the office on that Sunday and left word that he would not be reporting to work since he was going to church. He was subsequently given an unexcused absence for missing work that Sunday. (Pet. App. 21).

Smith was again scheduled to work on Sunday, August 15, 1982 and again he informed his supervisor that he would be absent from work due to his religious convictions against working on Sunday. He was given a second unexcused absence. After his second unexcused absence, Smith talked with David Dunbar, his supervisor, concerning his religious conflict and Mr. Dunbar in turn talked to the mine superintendent, Don Ramsey, who said that the unexcused absences would stand. Supervisor Dunbar promised Smith that he would ask his son to swap work days with Smith but this swap never took place. Smith also asked two other mechanics if they would swap with him and both declined. Smith then realized that it was wrong for him to personally solicit his own replacement since he was in effect asking that person to sin for him, however,

Smith was willing to work in a company arranged swap. (Pet. App. 4-5 and 21-22).

Other than Mr. Dunbar's unfulfilled promise to ask his son if he would swap shifts with Mr. Smith, Pyro management neither took any affirmative action to assist, nor offered to assist Smith in arranging shift trades (Pet. App. 5). Smith attempted to pursue the "open door policy" by consulting with supervisory personnel each and every time the conflict between his religious beliefs and company policy arose. Although Smith consulted with his immediate supervisor, the mine manager, the mine superintendent and others, his use of the "open door policy" was to no avail. (See Pet. App. 4-6).

Although at the time of his discharge mine superintendent Varney Coleman assured Smith that he would look into the matter and see if anything could be done, the cursory examination subsequently conducted by Asst. Manager of Employee Relations Paul Bruce Hill, at the request of Coleman appeared to be designed solely to back up management's decision to terminate Smith. (Pet. App. 6).

Smith's work performance while at Pyro was very good to excellent and had it not been for the three unexcused Sunday absences due to his religious convictions he would still be employed by Pyro today. (Pet. App. 6).

Through the date of trial Pyro management was aware of only two instances in which sabbatarians have had a conflict with the Sunday work schedule. (Pet. App. at 6).

Smith filed suit in the United States District Court for the Western District of Kentucky at Owensboro alleging violations of Title VII invoking the jurisdiction of the District Court pursuant to 42 U.S.C. §2000e-5(f) and 28 U.S.C. § 1343(4). On October 22, 1985, the District Court entered judgment in Smith's favor holding that, consistent with its previous policies and the requirements of Title VII, Pyro had an affirmative duty to assist Smith in arranging a shift swap by soliciting other workers through means such as notices posted on its bulletin boards, or in its bathhouses, published notices in its company newspaper, or otherwise and that Pyro had failed to make an effort to lend Smith such assistance despite the fact that the company had previously arranged shift trades for other employees. The court further held that Pyro had also failed to prove that it was unable to reasonably accommodate Smith's religious beliefs and practices without undue hardship on its business.

Pyro appealed the District Court's decision and the majority panel of the United States Court of Appeals for the Sixth Circuit affirmed the U.S. District Court holding that under Title VII as amended by Congress in 1972 explicitly adopting EEOC's interpretation of Title VII and the subsequent clarification of this change in the law by the U.S. Supreme Court in *Trans World Airlines* v. *Hardison,* 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977), that Pyro had an affirmative duty to accommodate Smith's religious beliefs and had failed to do so and that Pyro also failed to demonstrate that it was unable to reasonably accom-

modate Smith's religious observances and practices without undue hardship on its business.

ARGUMENT

The Petitioner frames five "bases" for the exercise of discretion to grant review in this case but in reality these issues can be reduced to three basic propositions. First, the Petitioner asserts that the U.S. Court of Appeals for the Sixth Circuit incorrectly decided that Pyro's establishment of rotating shifts for assignment of Sunday work and its passive policy of "allowing" shift swaps by co-workers is not sufficient to satisfy its legal obligations under 42 U.S.C. §2000e(j), Title VII of the Civil Rights Act under the facts of this case. Secondly, the Petitioner asserts the panel decision violates the doctrine of *stare decisis*. Finally Pyro argues that the religious accommodation provisions contained in Title VII of the Civil Rights Act as interpreted and applied by the Sixth Circuit under the facts of this case violate the establishment clause of the First Amendment to the United States Constitution.

For the reasons shown below none of the proferred reasons for review of this case on writ of certiorari is justified.

A. The Question of Whether the Application of Title VII Violates the Establishment Clause of the First Amendment Was Not Properly Raised or Preserved in the Courts Below.

Of the three meritless reasons relied on by Petitioner purportedly justifying the exercise of this court's powers of discretionary review, the only issue

which Respondent believes would even present a temptation to the Court to do so would be Petitioner's proffered issue of whether or not the application of the religious accommodation provisions of Title VII, as applied to the facts of this case, violates the establishment clause of the First Amendment to the U.S. Constitution. Unfortunately for Petitioner this issue was not raised or properly preserved in the courts below and cannot be considered by the Court on writ of certiorari.

As evidenced by Appendix A herein which consists of the Petitioner's answer to the Respondent's complaint in the U.S. District Court, Pyro did not place in issue the constitutionality of the religious accommodation provisions of Title VII as a defense to Plaintiff's action. A review of the transcript of the District Court action constituting the record on appeal herein reveals that this argument was neither made to the trial court nor was it presented in any of the briefs filed by Petitioner with the Sixth Circuit as evidenced by the tables of contents of Pyro's briefs in Appendix B.

Petitioner's argument that the religious accommodation provisions of Title VII as applied by the District Court and the Sixth Circuit allegedly violate the establishment clause of the First Amendment was first raised by Petitioner in its Motion for Rehearing and Suggestions for Hearing *En Banc* which was filed with the Sixth Circuit. (See Table of Contents of Motion for Rehearing in Appendix C). As such, the matter is clearly not preserved and cannot be considered by this Court in determining whether or not to grant certiorari.

The Court recently reaffirmed this principle in *Hoover* v. *Ronwin,* 466 U. S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984), holding that a contention raised for the first time in a response to a motion for rehearing in the United States Court of Appeals may not be raised before the United States Supreme Court on certiorari to review the Court of Appeals judgment because the failure to raise the issue in a timely manner precludes the Supreme Court's consideration of it. Id. 80 L. Ed. 2d at 603, footnote 7b.

The Petitioner raised its constitutional challenge to Title VII as an after-thought in its Motion for Reconsideration which was denied below. Having failed to raise this issue either in its pleadings before the trial court or before the Court of Appeals and having failed to give either court the opportunity to pass on the question, the Supreme Court's review of the same is now precluded.

B. The Decision Below Does Not Conflict With Any Analogous Decisions From Other Circuits, and Is Consistent With Both Title VII and the Decision of This Court in *TWA* v. *Hardison.*[1]

The decision below does not conflict with the decision proffered by Petitioner in *EEOC* v. *Ithaca Industries,* 44 F.E.P. Cases 1572 (W.D.N.C. 1986), aff'd, 126 L.R.R. 21 (4th Cir. October 12, 1987), because the facts of these cases are completely distinguishable. In this case, unlike *Ithaca,* it is abundantly clear that Smith did not absolutely refuse to work on Sundays and demonstrated his willingness to cooperate in a reason-

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[1] *supra.* at 6.

able accommodation by previously cooperating with the company by reporting for work at 11:00 p.m. on Sundays for the 11-7 shift and by his willingness to participate in a company arranged shift trade had Pyro ever made an effort to do so.

Contrary to the arguments of Pyro, the majority panel herein clearly articulated the correct analysis of religious discrimination cases under Title VII that once a *prima facie* case of discrimination has been made out by the Plaintiff, as it was here, the employer must show either that a reasonable accommodation of the employee's religious beliefs and practices was made or that such an accommodation is impossible without incurring undue hardship. (See *Ansonia Board of Education* v. *Philbrook,* 479 U.S. ——, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986).

In its petition for certiorari Pyro continues to assert the same unsuccessful argument that it has made throughout this matter that it's publicized consent to shift swapping supplemented by the "open door policy" was sufficient to satisfy its duty to accommodate Danny Smith's religious beliefs.

Pyro's cert petition repeatedly makes false statements of facts, contradicted by the record and explicitly contrary to the factual findings of the District Court which were affirmed by the Sixth Circuit, that Smith was uncooperative with respect to a company arranged shift trade and that Smith did not pursue the open door policy. (Petitioner's brief at pp. 4, 6, 8-11, 13). As the District Court found, Smith at all times indicated his willingness to participate in a company

arranged shift trade and through the open door policy consulted with his immediate supervisor, the mine manager, the mine superintendent, and the personnel director in an attempt to achieve resolution of his conflict. (Pet. App. 2, 4-6, 19). Pyro's open door policy was useless to Smith because this policy imposed no duty at all on Pyro to take any action whatsoever to resolve an employee's schedule conflict even if the grievances were pursued up to the President of Pyro.

By his previous cooperation in the accommodation of his own beliefs by reporting to work at 11:00 p.m. on Sundays for the 11 to 7 shift and his willingness to participate in a company arranged shift swap Smith demonstrated that he was not refusing to attempt to accommodate his beliefs or to cooperate with the employer in an attempt to reach a reasonable accommodation. Thus, contrary to Pyro's argument under the aegis of *Chrysler Corporation* v. *Mann,* 561 F. 2d 1282 and 1285 (8th Cir. 1977), *cert den.* 434 U.S. 1039 (1978), Smith is not purporting to shift all responsibility for accommodation to Pyro. Smith's willingness to cooperate in a company arranged swap fully comports with the teaching of *Brener* v. *Diagnostic Center Hospital,* 671 F. 2d 141, 145-46 (5th Cir. 1982).

Because of Pyro's awareness of Smith's sabbatarian beliefs and its specific knowledge that his beliefs were being compromised by its employment practices, the Sixth Circuit properly held that Pyro was legally obligated under Title VII to make an affirmative effort to accommodate Smith's religious beliefs and practices. In view of these facts the decision here is completely

consistent with analogous cases in the other circuits. (See *Anderson* v. *General Dynamics Convair Aero Space Division,* 589 F. 2d 397 (9th Cir. 1978); *Burns* v. *Southern Pacific Transportation Company,* 589 F. 2d 403 (9th Cir., 1978), cert. denied 439 U.S. 1072 (1979); *Redmon* v. *GAF Corporation,* 574 F. 2d 897 (7th Cir. 1978); *Brown* v. *General Motors Corp.,* 601 F. 2d 956 (8th Cir. 1979) and *McDaniel* v. *Essex International, Inc.,* 509 F. Supp. 1055, 1058, (W.D. Mich. 1981), on remand from 571 F. 2d 338 (6th Cir. 1978), aff'd., 696 F. 2d 34 (6th Cir. 1982).

Because the Sixth Circuit correctly determined that Smith's belief against being forced to personally solicit his own replacement was sincerely held, the burden fell on Pyro to do more than to passively "allow" shift trades but rather to take a more active role in assisting Smith in arranging a shift trade, something which Pyro admittedly did prior to the change to the four day work week.

Pyro for the first time in its petition before this Court admits that it could have implemented its own solicitation for volunteers to swap with Smith (See Petitioner's brief at p. 10). However Pyro now argues that even the innocuous task of putting a notice on a bulletin board would require Pyro to expend more than *de minimus cost.* Despite the fact Pyro failed to introduce evidence on this point at trial it is impossible to imagine how Pyro's responsibilities in this regard would be any different whether it was a company arranged swap or whether the employee identified his own replacement.

Pyro complains that if it were to arrange a shift swap that such an accommodation would require supervisor and management time to review volunteer names to insure that the substitute from another shift is a mechanic, that the substitute has not recently worked so long that the additional overtime would create a safety hazard, or that federal wage laws do not require overtime pay for the substitute.

Aside from the fact that these factors were never presented to the trial court for its consideration, Pyro does not and logically cannot explain why these costs are *de minimus* for purposes of an employee arranged swap which Pyro advances as an acceptable accommodation but not for a company arranged swap. No more burden is placed on Pyro's business under the so called "voluntary shift swapping system" than under a company arranged shift trade.

Despite the fact that Pyro was on notice as to the specific conflict of its work schedule with Smith's religious beliefs and practices including his belief that personally soliciting his own replacement was sinful, Pyro persists in maintaining that its only duty to Smith was to allow a shift trade in order to accommodate Smith. Pyro invokes *Hardison, supra,* to defend its so called accommodation, but closer examination of *Hardison* reveals that unlike Pyro numerous affirmative steps were taken by the employer in that case to accommodate the employee's religious needs. In *Hardison* the employer did at least four things to satisfy its duty to accommodate the employee. First, it held meetings with the employee in an attempt to find a solution.

Second, it accommodated the employee in his observance of his special religious holidays. Third, it authorized the union steward to search for someone who would swap shifts. Fourth, it attempted to find Hardison another job.

While Pyro tries to parallel its actions to those of the employer in *Hardison* the facts reveal that in *Hardison* all actions taken by the employer were affirmative steps directed toward resolution of the individual employee's religious conflict, whereas Pyro's proffered "accommodation" consists of nothing more than its passive policy of allowing shifts swaps even though this did not resolve Smith's conflict. Thus, the Sixth Circuit correctly held that Pyro's actions failed to conform to the requirements of both *Hardison* and Title VII.

C. The Panel's Decision Does Not Conflict With the Doctrine of Stare Decisis

The majority panel decision below clearly articulates its rationale justifying its departure from the *Dewey*[2] decision observing:

> However, when Congress amended Title VII in 1972, it added the reasonable accommodation requirement, thereby explicitly adopting the EEOC's interpretation of Title VII. Following the 1972 amendment, courts could no longer dispute that Title VII mandated reasonable accommodation. See *Hardison,* 432 U.S. at 74. Therefore, given the significant change in the law since our decision in

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[2]429 F. 2d 324 (6th Cir. 1970), aff'd by an equally divided Court, 402 U. S. 689, 91 S. Ct. 2186, 29 L. Ed. 2d 267 (1971).

> *Dewey*, we consider the issue now before us anew. Pet. App. 30-31.

The majority panel below further clarified its decision and responded to the dissent (which is parroted by Pyro in its Petition for Certiorari), by stating in footnote 7:

> The dissent contends that the majority opinion "summarily overrules the precedent of *Dewey*" and ignores this circuit's tradition that reported panel opinions are binding upon subsequent panels. We disagree with these characterizations of the majority opinion. We neither overrule binding precedent nor ignore circuit tradition. The binding effect of *Dewey* was undermined by Congress, not by this panel. As a court of law we are bound to interpret and apply the law that exists when we decide a case. When intervening changes in the law have proved prior precedent to be incorrect, a subsequent panel is not bound to continue following the disapproved precedent. Such blind allegence is both unwise and unwarranted.
>
> Congress has spoken, and in doing so it has signalled that our decision in *Dewey* seventeen years ago is no longer good law. We are bound to follow the dictates of Congress. We do not overrule binding precedent in doing so. Instead, we merely revisit the issue considered in *Dewey* and resolve it in accordance with current law." (Pet. App. at 32).

Certainly the majority panel's reasoning and explanation of its decision is reinforced by both judicial decisions and legislative history surrounding the amendment to Title VII. (See for example *Cooper* v.

General Dynamics, 533 F. 2d 163, 167 (5th Cir. 1976); *Riley* v. *Bendix Corporation,* 464 F. 2d 1113, 1116-17 (5th Cir. 1972) (discussing legislative history of the amendment). The relevant legislative history memorializing the Congressional debate surrounding the adoption of the 1972 amendment to Title VII which incorporated EEOC regulations regarding accommodation of employee religious practices also supports the court's reasoning in this regard. (See 118 Congressional Record §§227-53 (1972)).

The Sixth Circuit's opinion below fully comports with the doctrine of *stare decisis* in that prior Sixth Circuit precedent holds that previous panel decisions are not controlling if there has been an intervening change in the substantive law. See *Smith* v. *U.S. Postal Service,* 766 F. 2d 205, 207, (6th Cir. 1985). Consistent with this authority a majority of the remaining justices of the circuit apparently agreed with the majority panel's analysis since Petitioner's Motion for Reconsideration *En Banc* was summarily rejected.

D. The Majority Panel Decision Correctly Affirmed the District Court's Findings as to the Sincerity of Smith's Religious Beliefs.

Pyro, in an attempt to place Smith in the proverbial "catch 22 situation," argues that Danny Smith's religious beliefs were so rigid as to preclude accommodation but on the other hand that his cooperation with Pyro in accommodating his beliefs by reporting for work at 11:00 p.m. Sunday night for the 11 to 7 shift renders those same beliefs insincere. Pyro cannot have

it both ways. The District Court considered Pyro's argument in this regard and concluded that Smith's willingness to cooperate as set out above did not detract from Smith's sincerity. (Pet. App. at 8). In reviewing the District Court's findings the Sixth Circuit explicitly stated "We are easily convinced that the District Court's findings were not clearly erroneous." (See Pet. App. at 27).

Prior to Pyro's change to the eight day work schedule it was unnecessary for Danny Smith to solicit his own replacement. After the change to the eight day work schedule, Pyro ceased its participation in arranging shift trades for employees. It was only at this point that Danny Smith was required to make a decision as to whether it was morally right for him to directly solicit other employees to work in his place on Sundays.

After hearing the evidence with respect to Smith's convictions against soliciting a replacement to work for him, the District Court properly concluded that these beliefs were sincerely held. This conclusion was affirmed by the majority panel. (Pet. App. at 33).

At the trial it was shown through testimony that Danny Smith's church interprets the Bible to prohibit work on Sunday except in emergency situations and that anyone who works on Sunday except in an emergency is not qualified to teach in the church. Danny Smith testified that he personally believes that he should not work on Sunday or solicit others to do so and that this belief is based on the Biblical injunction to "honor the sabbath and keep it Holy." Danny's

religious convictions in this regard were further corroborated by his pastor who testified that their church doctrines concerning sabbath work are based on the Old Testament of the Bible contained in the Ten Commandments, appearing in both the books of Exodus and Deuteronomy. Rev. Camplin also indicated that Danny Smith requested prayer on his behalf at a church service upon learning of the impending schedule change to the eight day work week at Pyro Mining Company. Danny Smith not only described his conversion experience at length but specifically related his religious convictions and actions concerning Sabbath work to precise Biblical references and the doctrines and tenets of his church. Mr. Smith's beliefs concerning Sunday work and personally soliciting others to do what he considered to be sinful were much more than a matter of personal preference but were clearly demonstrated to be deeply held religious convictions shared by his church and inextricably related to his daily living. As such Danny Smith's religious beliefs were correctly determined by the trial court and affirmed by the Sixth Circuit to be sincerely held and fully comport with the objective test established by this court in determining the sincerity of religious beliefs. See *Wisconsin* v. *Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *U.S.* v. *Seeger,* 380 U.S. 163, 13 L. Ed. 2d 733, 85 S. Ct. 850 (1965).

The Sixth Circuit also correctly noted that notwithstanding Pyro's challenge to the sincerity of Smith's convictions against soliciting his own replacement that Pyro obviously did not accommodate Smith's sabba-

tarian belief on the first Sunday of its new schedule because all employees were required to report to work on that day therefore a shift swap would have been difficult or impossible to arrange. (See Pet. App. at 33).

E. The Majority Panel Decision Is Consistent With the Establishment Clause.

With respect to Pyro's argument that the majority panel opinion transgresses the establishment clause of the First Amendment under the "test" set forth in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, 755 (1971), as has been established Pyro failed to preserve this issue and it should not be considered. However, in the unlikely event that the Court finds some justification for reaching the issue, it is clear that Pyro's concerns in this regard are misplaced because Pyro has misapprehended the purpose of Title VII of the Civil Rights Act.

Similar objections to the religious accommodation provisions of Title VII have previously been rejected in at least three federal circuit Courts of Appeal including the Sixth Circuit. See *Cummins* v. *Parker Seal Co.,* 516 F. 2d 544 (6th Cir. 1975), rev'd on other grounds, 433 U.S. 2965 (1977). In *Cummins* the court held that the religious accommodation provisions of Title VII promote religious freedom, which benefits all people, and that the provision does not violate the establishment clause. In relevant part the court observed, "in our view, the primary effect . . . is to inhibit discrimination not to advance religion." 516 F. 2d at 546 (sic).

The secular purpose of the religious accommodation provisions of Title VII is to remove a barrier allowing discrimination in employment and to eliminate the situation where an employee is forced to abandon "one of the precepts of "his" religion in order to accept work . . ." *Sherbert* v. *Verner,* 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963). By adopting this statute and its subsequent amendments Congress merely promotes equal employment opportunities for members of all religious faiths.

The religious accommodation provisions of Title VII do not have a "primary effect" that advances or inhibits religion. As this Court observed in *Committee* for *Public Education* v. *Nyquist,* 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973), ". . . not every law that confers 'indirect', 'remote' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." 37 L. Ed. 2d at 962. Congress by enacting 701(j) is in no way offering sponsorship, financial support or active involvement to any religious activity. The primary effect of the religious accommodation provisions of Title VII accrues to individuals and not to any religious organization. As Chief Justice Burger observed in *Nyquist:*

> "The answer, I believe, lies in the experienced judgment of various members of this court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families." 37 L. Ed. 2d at 980.

Congress' interest in religion as manifested in the religious accommodation provisions of Title VII is only for the purpose of outlawing religious discrimination in employment. This certainly cannot be interpreted as "excessive entanglement" with religion in any sense of these words.

In its cert petition Pyro fails to cite two previous decisions of this Court which quickly put to rest any false doubts which it attempts to raise in this regard. In *Estate of Thornton, et al.* v. *Caldor, Inc.*, 472 U.S. ——, 86 L. Ed. 2d 557, 105 S. Ct. —— (1985), this Court, applying the test enuneiated in *Lemon* v. *Kurtzman, supra,* concluded that a Connecticut statute providing that no person stating a particular day of the week as his sabbath may be required by his employer to work on such day, violated the establishment clause of the First Amendment because it had a primary effect that impermissibly advanced religion. In her concurring opinion Justice O'Connor, joined by Justice Marshall, while agreeing with the majority clarified that:

> I do not read the court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act are similarly invalid. These provisions preclude employment discrimination based on a person's religion and require private employers to reasonably accommodate religious practices of employees unless to do so would cause undue hardship to the employer's business. 42 U.S.C. § 2000e(j) and 2000e-2(a)(1) [42 U.S.C.S. §2000e(j) and 2000e-2(a)(1)]. Like the Connecticut Sabbath Law, Title VII attempts

to lift a burden on religious practice that is imposed by private employers and hence it is not the sort of accommodation statute specifically contemplated by the free exercise clause. (See *Wallace* v. *Jaffrey*, —— U.S. ——, ——, 86 L. Ed. 2d 29, 105 S. Ct. ——, 53 U.S.L.W. 4665 (1985); (Opinion concurring in the judgment)." "The provisions of Title VII must therefore manifest a valid secular purpose and effect to be valid under the establishment clause. *In my view a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society.* (See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 90, Note 4, 53 L. Ed. 113, 97 S. Ct. 2264 (1977). (Marshall J., dissenting). Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice. (emphasis supplied). 86 L. Ed. 2d at 564.

This Court's recent decision in *Corporation of Presiding Bishop et al.* v. *Amos*, 483 U.S. ——, 97 L. Ed. 2d 273, 107 S. Ct. —— (1987), rejecting a similar challenge to the constitutionality of section 702 of the Civil Rights Act, reinforces the views expressed in *Thornton, supra*, with respect to the proper *Lemon* analysis of the religious accommodation provisions of Title VII.

As the *Amos* majority observed:

This Court has long recognized that government may (and sometimes must) accommodate religious

> practices and that it may do so without violating the establishment clause, *Hobbie* v. *Unemployment Appeals Commission of Fla.*, 400 U.S. ——, ——, 94 L. Ed. 2d 190, 107 S. Ct. 1046 (1987). 97 L. Ed. 2d at 282.
>
> There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. Id. at 669, 25 L. Ed. 2d 697, 90 S. Ct. 1407. 97 L. Ed. 2d at 282.

The *Amos* Court also clarified that the *Lemon* requirement that the challenged statute serve a "secular legislative purpose" does not mean that its purpose must be unrelated to religion. In the Court's view . . . "that would amount to a requirement that the government show a callous indifference to religious groups." *Id.* at 282.

Consistent with Title VII's secular purpose, in this case Danny Smith does not seek absolute accommodation or government endorsement of his sabbatarian beliefs, only reasonable accommodation of his religious beliefs, and his right to hold them and practice them, which reasonable accommodation has been denied to him thus far by Pyro Mining Company despite its convoluted attempts to portray the facts of this case otherwise.

Smith does not seek to use Title VII here as a method to obtain governmental imprimatur for the particular beliefs of his church which he sincerely holds. Rather, Smith is attempting to use protections afforded him under Title VII as a Civil Rights enforce-

ment mechanism to insure that he is not singled out or discriminated against because of his sincerely held religious beliefs.

Nothing in the Sixth Circuit's decision undertakes to afford Smith the opportunity to practice his religious beliefs as only he defines them. The facts of record are clear that Danny Smith's sincerely held religious beliefs are based on the doctrines of his church and specific portions of the Scriptures which define the beliefs of his denomination.

The federal government is not being asked to become an arbiter of Smith's beliefs or to surveill employee religious practices in violation of the establishment clause. Smith here is merely seeking not to be discriminated against because of his exercise of his sincerely held religious beliefs under §701(j) of Title VII of the Civil Rights Act. Throughout the litigation Pyro has attempted and still attempts to cast the burden on Smith to completely set aside his religious convictions. Pyro refuses to acknowledge any meaningful, affirmative responsibility to provide a reasonable accommodation. Pyro, as well as many other employers, would no doubt prefer to make 701(j) a complete nullity. Fortunately, neither the Sixth Circuit nor this Court has excused employers from the affirmative duty to "reasonably accommodate" employee religious observances and in this case Pyro has clearly not met that obligation. *Hardison, supra, McDaniel* v. *Essex International, Inc.*, 571 F. 2d at 343 (6th Cir. 1978) and *Draper* v. *U.S. Pipe & Foundry Company*, 527 F. 2d 515 (6th Cir. 1976).

CONCLUSION

For all the foregoing reasons and based on the above points and authorities, the record below and the opinions of the U.S. District Court and the U.S. Court of Appeals for the Sixth Circuit, Danny R. Smith respectfully submits that the majority panel decision should not be accepted for review by this court because it is totally consistent with the letter and spirit of Title VII and the current state of the law as expressed in the *Hardison* decision clarifying that private employers still have an affirmative duty to accommodate the religious needs of employees. Thus, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THEODORE H. AMSHOFF, JR.
RICHARD L. MASTERS
AMSHOFF, AMSHOFF, & SEARCY
1012 S. Fourth Street
P. O. Drawer 2848
Louisville, Kentucky 40201
(502) 582-3500

Attorneys for Respondent,
Danny R. Smith

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

Civil Action No. 83-0126-0(B)

DANNY R. SMITH, - - - - - - - *Plaintiff,*

v.

PYRO MINING COMPANY, - - - - *Defendant.*

DEFENDANT'S ANSWER

FIRST DEFENSE

The Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

1. The first paragraph of the Complaint is a description of plaintiff's action and requires neither an admission nor a denial; but to the extent said description creates the inference that defendant unlawfully discriminated against plaintiff, it is denied.

2. As to paragraph 2 of the Complaint, defendant admits that the statutes set forth therein provide a jurisdictional basis for suits alleging unlawful discrimination in private employment and for suits seeking declaratory relief; but to the extent said paragraph creates the inference that such relief is appropriate here, it is denied.

3. As to paragraph 3 of the Complaint, defendant admits that plaintiff did file a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC); however, as to the rest and residue of said paragraph, defendant is without sufficient information to admit or to deny the allegations set forth therein and demands strict proof thereof.

4. Defendant is without sufficient information to admit or to deny the allegations set forth in paragraph 4 of the Complaint and demands strict proof thereof.

5. As to paragraph 5 of the Complaint, defendant denies that it is a partnership; but admits the rest and residue of the allegations contained therein.

6. Defendant denies the allegations contained in paragraph 6 of the Complaint.

7. Defendant admits the allegations contained in paragraph 7 of the Complaint.

8. Defendant is without sufficient information to admit or to deny the allegations contained in paragraph 8 of the Complaint and demands strict proof thereof.

9. Defendant denies the allegations contained in paragraph 9 of the Complaint.

10. Defendant admits the allegations contained in paragraph 10 of the Complaint.

11. Defendant admits the allegations contained in paragraph 11 of the Complaint.

12. Defendant denies the allegations contained in paragraph 12 of the Complaint.

13. Defendant admits the allegations contained in paragraph 13 of the Complaint.

14. Defendant admits the allegations contained in paragraph 14 of the Complaint.

15. Defendant admits the allegations contained in paragraph 15 of the Complaint.

16. Defendant admits the allegations contained in paragraph 16 of the Complaint.

17. Defendant denies the allegations contained in paragraph 17 of the Complaint.

18. Defendant admits the allegations contained in paragraph 18 of the Complaint.

19. Defendant admits the allegations contained in paragraph 19 of the Complaint.

20. Defendant denies each and every allegation contained in paragraph 21 of the Complaint.

21. Defendant denies each and every allegation contained in paragraph 23 of the Complaint.

22. Defendant denies each and every allegation contained in paragraph 25 of the Complaint.

23. Defendant denies each and every allegation contained in paragraph 27 of the Complaint.

24. The remainder of the Complaint contains a prayer for relief requiring neither admission nor denial; but to the extent said prayer creates the inference that defendant unlawfully discriminated against plaintiff because of his religion, or that plaintiff is entitled to relief of any kind whatsoever, said inference is denied.

THIRD DEFENSE

Defendant attempted to reasonably accommodate plaintiff by allowing him to refrain from working his scheduled Sunday shifts as long as he secured a substitute to cover his job for that shift. Plaintiff failed and refused to make a good faith attempt to find a substitute to cover for him on his scheduled Sunday shifts and is, therefore, estopped from asserting a claim of religious discrimination.

FOURTH DEFENSE

Plaintiff is not a member of or an adherent to established and traditional tenets or teachings of a bona fide religion or sect which has historically objected to work on Sunday.

FIFTH DEFENSE

The Complaint is barred by applicable statutes of limitation.

Respectfully submitted,

Constangy, Brooks & Smith
Attorneys for Defendant
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303
Telephone No. (404) 525-8622

By: (s) Edward Katze
By: (s) James N. Nolan

Holbrook, Gary, Wible &
Sullivan, P.S.C.
Attorneys for Defendant
Post Office Box 727
100 St. Ann Building
Owensboro, Kentucky 42301
Telephone No. (502) 926-4000

By: (s) Ralph W. Wible

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Defendant's Answer was served by U.S. Mail, postage prepaid, on the following counsel of record:

Theodore H. Amshoff, Jr., Esq.
Amshoff & Amshoff
1445 Starks Building
455 Fourth Avenue
Louisville, Kentucky 40202

Signed this 27th day of June, 1983.

(s) Edward Katze
Edward Katze

APPENDIX B

TABLE OF CONTENTS

		PAGE
I.	Table of Cases, Statutes and Other Authorities	ii
II.	Disclosure of Corporate Affiliations and Financial Interest	iv
III.	Statement of Issues	1
IV.	Statement of the Case	2
	A. Nature of the Case	2
	B. Course of Proceedings and Disposition in the Court Below	2
	C. Statement of Facts	4
V.	Arguments	12
	A. Introduction	12
	B. The Trial Court's Finding That Smith Sincerely Believed That It Is Immoral For Him to Work on Sundays Is Clearly Erroneous	14
	C. The Trial Court's Conclusion That Title VII Requires Pyro to Accommodate Smith's Refusal to Find a Replacement Is Reversible Error	20
	D. The Trial Court's Conclusion That Section 701(j) Requires Pyro to Have Designed Its Employment Policies to Benefit Smith Only and Particularly Is Reversible Error	24
	E. The Trial Court's Conclusion That Pyro Failed to Establish Undue Hardship Is Clearly Erroneous	39
VI.	Conclusion	44
Certificate of Service		47
Addendum		48

TABLE OF CONTENTS

	PAGE
I. Table of Cases, Statutes and Other Authorities	ii
II. Introduction	1
III. Arguments	2
A. The Sincerity of Smith's Professed Religious Beliefs Should Have Been Judged by Both His Conduct and His Statements Rather Than by His Statements Only	2
B. Smith's Conduct Shows That His Refusal to Find a Replacement for His Sunday Shifts Was Motivated by Personal Convenience	4
C. Smith's Refusal to Find a Replacement for His Sunday Shifts Frustrated Pyro's Accommodation of His Desire to Avoid Sunday Work	7
D. Pyro Established That Further Accommodation of Smith's Alleged Religious Beliefs Would Have Constituted an Undue Hardship	9
IV. Conclusion	11
Certificate of Service	13

APPENDIX C

TABLE OF CONTENTS

	PAGE
Statement Supporting En Banc Hearing	i
Table of Contents	iii
Index of Authorities	iv
I. Statement of Issues Meriting Panel Rehearing and En Banc Consideration	1
II. Statement of the Case	2
A. Nature of the Case	2
B. Course of Proceedings and Disposition Below	2
C. Statement of Facts	3
III. Argument	4
A. The Doctrine of *Stare Decisis* Requires En Banc Review of the Panel Majority's Decision Declining to Follow the Precedent of *Dewey* v. *Reynolds Metals Co.*	4
B. By Offering the Opportunity for Shift Swaps and Through Its Open Door Policy, Pyro Mining Company Discharged Its Duty to Reasonably Accommodate Its Employees' Religious Beliefs.	7
C. The Degree to Which the Panel Would Involve Government in the Supervision of Employer Accommodation to Employees' Religious Beliefs Impermissibly Invades the Prohibitions of the Establishment Clause of the First Amendment to the United States Constitution.	10
IV. Conclusion	15
Addendum	
Certificate of Service	